BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 84A-596
LEWIS AND MARTHA I. FURER	)	

Appearances:

For Appellants: Lewis Furer, in pro. per.

For Respondent: B. S. Heir, Counsel

O P I N I O N

This appeal is made pursuant to section 18593[1/] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Lewis and Martha I. Furer against proposed assessments of additional personal income tax in the amounts of $8,176, $2,521, and $3,786 for the years 1980, 1981, and 1982, respectively.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

The question raised in this appeal is whether respondent properly determined appellants' capital gains tax preference item.

Appellants filed joint personal income tax returns for 1980, 1981, and 1982. In 1980, appellants reported a net loss of $1,185,354 on capital assets held not more than one year and a net gain of $490,429 on capital assets held more than one year but not more than five years. In 1981 and 1982, appellants reported net capital gains. In none of these years did appellants report a tax on preference income. Respondent issued notices of proposed assessment in 1984 reflecting tax due on preference items.

Section 17062 imposed a tax on "the sum of the items of tax preference in excess of the amount of net business loss for the taxable year." Subdivision (g) of section 17063 provides, in part:

> For taxable years beginning after December 31, 1971, the amount of the tax preference income with respect to capital gains shall be an amount (but not below zero) equal to the difference between (1) the taxpayer's total net capital gains and losses (determined without regard to any capital loss carryover) for the taxable year, and (2) the taxpayer's net capital gains and losses recognized by virtue of Section 18162.5 for the same taxpayer year.

Section 18162.5 provides that only a specified percentage of capital gain or loss is recognized when computing taxable income: 100 percent is recognized if the capital asset sold was held for not more than 1 year; 65 percent if the capital asset sold was held for more than one year but not more than 5 years; and 50 percent if the capital asset sold was held for more than 5 years. Thus, it is the unrecognized portion of capital gains from assets held more than one year that is treated as a tax preference item.

Appellants do not dispute respondent's calculation of their capital gains tax preference items. What appellants appear to object to is the fact that since 1972, their capital losses in earlier years on assets held for more than one year were reduced under section 18162.5 and this, in turn, reduced the capital loss carryover which they could use to offset capital gains in future years. Before 1972, taxpayers were allowed to

carry forward all their excess capital losses indefinitely and apply them at 100 percent against current gains until exhausted. (Appeal of Chester A. Rowland, Cal. St. Bd. of Equal., Oct. 21, 1975.) Appellants acknowledge that the reduction in their capital loss carryover may be offset in future years by the reduction in their reportable capital gains, but appear to argue that the capital loss carryover which they "lost" by virtue of section 18162.5 should be entirely made up for before they are subject to the preference tax on capital gains.

We fail to see the merit in this argument, since taxpayers are no longer entitled to use 100 percent of their capital losses, either current or as carryovers, to offset capital gains. Section 17063 specifically excludes consideration of any capital loss carryovers, in any amount, in determining the amount of capital gains subject to the preference tax. Although we consider the facts of each appeal individually, this board is charged with interpreting and enforcing the law as enacted by the Legislature and we are without authority to change that law. (Appeal of Chester A. Rowland, supra.) Appellants' disagreement with the law should be addressed to the Legislature, which is charged with formulating the law, not those charged with enforcing it.

For the reasons stated above, we must sustain respondent's action.

Appeal of Lewis and Martha I. Furer

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Lewis and Martha I. Furer against proposed assessments of additional personal income tax in the amounts of $8,176, $2,521, and $3,786 for the years 1980, 1981, and 1982, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of October, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Bennett, Mr. Nevins and Mr. Harvey present.

Ernest J. Dronenburg, Jr., Chairman

Conway H. Collis, Member

William M. Bennett, Member

Richard Nevins, Member

Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9